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IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER ATTORNEY GENERAL OF THE STATE OF NEW YORK AS STATUTORY INTERVENOR

ANDREW M. CUOMO
Attorney General of the
State of New York
120 Broadway
New York, NY 10271
(212) 416-8016

BARBARA D. UNDERWOOD*
Solicitor General

BENJAMIN N. GUTMAN
Deputy Solicitor General

DENISE A. HARTMAN
Assistant Solicitor General

Attorneys for Petitioner
Attorney General of the State of New York
as Statutory Intervenor

* *Counsel of Record*

210544

CP

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(800) 274-3321 • (800) 359-6859

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INTRODUCTION

Respondents' argument that the New York statutes on nominating conventions are facially unconstitutional ultimately rests on one basic contention: that the conventions are dominated by party insiders who choose nominees who would not win a direct vote among the rank-and-file party members. This, according to respondents, violates the First Amendment rights of challenger candidates and rank-and-file members.

But respondents fail to grapple with two key points that the Attorney General of the State of New York made in its opening brief. First, delegate-based conventions have long been accepted as a legitimate alternative to direct primaries. And of course conventions will not always produce the same results that a primary would — the point of using a convention instead of a primary is so that the delegates can exercise independent judgment. The Constitution does not require that rank-and-file party members have a direct say in nominating their party's judicial candidates.

Second, the abuses about which respondents complain cannot be blamed on the statutes, which provide ample opportunity for rank-and-file voters to influence the process and for elected delegates to engage in serious debate about the candidates' merits. They are the product of the private conduct of party leaders and voters — conduct that respondents concede is not regulated by the First Amendment. Party members choose their judicial delegates and their party's committee persons who, in turn, choose their county leaders. If the system has been hijacked by party leaders to serve their own interests rather than the party's, it is up to the party members to reign in those leaders. The solution is not, as the lower courts did here, to invalidate the statutes on their face and replace the Legislature's chosen nomination system with an entirely different one.

I. Conventions Are Constitutional Even When They Do Not Produce Results That Mirror Direct Primaries.

1. Respondents do not dispute that delegate-based conventions are deeply rooted in our Nation's history. *See* Attorney General's Pet. Br. at 18-24. Nor do they dispute that delegate-based conventions are not designed to foster candidate-driven campaigns or to produce results that mirror the popular vote. *See* Attorney General's Pet. Br. at 24-27. In view of the long history of using conventions in this country, there can be no real question that they are a constitutional means for selecting candidates. *See American Party of Texas v. White*, 415 U.S. 767, 781 (1974) (it is "too plain for argument" that states may require intraparty competition to be settled by convention or primary).

Respondents nonetheless contend that New York's convention system for nominating Supreme Court Justices is unconstitutional because it "freeze[s]" or "locks out" challenger candidates and makes it more difficult for rank-and-file party members to influence the choice of their party's nominee directly. Resp. Br. at 15, 25. But that is just another way of saying that conventions neither foster candidate-driven campaigns nor produce the same results that direct primaries would. Candidates are not meant to run a slate of pledged delegates who will vote for them at the convention, and it therefore is irrelevant that New York may have too many assembly districts to make it feasible to do so. *See* Resp. Br. at 3. Delegates are supposed to come the convention open to the give-and-take involved in selecting multiple candidates for a set of vacancies throughout the judicial district. It is at the convention that the party is meant to debate the merits of potential candidates and to choose the nominees, not at the delegate-selection stage.

It should be no surprise that under a convention system, rank-and-file members lack a direct voice in choosing their party's nominees. That is the whole point of delegate-based conventions. As the long history of conventions demonstrates, there is no constitutional infirmity in having well-informed representatives convene to debate, compromise, and ultimately nominate candidates for office. Doing so does not "force a political party to accept a candidate it may not want." Resp. Br. at 22. If the party's own elected representatives make the choice in accordance with the party's own rules, the nominee, by definition, represents the party's choice.

Respondents point to nothing in the Constitution or this Court's precedent that requires rank-and-file party members to have a direct, unmediated say in their party's judicial nominations. Nor should there be such a requirement, which effectively would force the State to choose between a purely appointive system and direct primaries or their functional equivalent. Representative democracy lies at the heart of our national traditions, and there is no good reason to prohibit the State from continuing to employ it in this context as well.

2. Perhaps in view of conventions' pedigree, respondents concede that at least some forms of delegate-based nominating conventions are constitutional. *See* Resp. Br. at 43-45. For example, they point to state laws authorizing party leaders to endorse their preferred candidates at pre-primary conventions, but that let the nomination ultimately be decided in direct primary elections. Resp. Br. at 44. Or, respondents suggest, it might be permissible for New York to adopt the model of post-primary nominating conventions, under which delegates elected at primary elections are pledged to vote for specific candidates at the convention — although it is unclear how such a model could work when there are multiple vacancies being filled together. Resp. Br. at 46.

But these models, whatever their merits as a matter of policy, are not true convention systems. They employ conventions only as an add-on to direct primaries. States, of course, are free to adopt these sorts of hybrids, but that does not make it unconstitutional for New York to use the convention method in its purer form.

Respondents also seem to suggest that conventions are constitutionally acceptable when the State leaves it to the political parties themselves to determine who will be a delegate at the party's convention and what role the delegates may have. Resp. Br. at 44. But that undermines their argument that Constitution demands that rank-and-file members have a direct voice in nominations. If it is permissible for the party leadership to close the convention to all but hand-picked party insiders and then to give them only a peripheral role in the nominating process, surely it must be constitutional for New York to place minimal constraints on the party designed to protect the interests of rank-and-file members — for example, requiring that convention delegates be elected by the rank-and-file members and ensuring that those delegates have the right to vote for the candidates of their choice. *See* N.Y. Election Law §§ 6-124, 6-126.

3. Respondents find it significant that New York has retained delegate-based nominating conventions only for the office of Supreme Court Justice, while it has adopted direct primaries for other state offices. Resp. Br. at 27. But this is not, as respondents suggest, evidence that conventions are meant to be unduly burdensome for candidates and voters. Rather, it reflects unique features of the office of Supreme Court Justice, even among judicial offices. The Legislature has reasonably concluded that these features justify a somewhat different nominating process from those that are used for other offices.

Perhaps more so than other public officers, judges must be both qualified and independent. Given those needs, there is no constitutional requirement that voters have a direct say in the choice of judicial officers at all. *See Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002). For this reason, the judges of New York's highest court are appointed, as are its judges of various specialty courts. New York's intermediate appellate judges are also appointed, although they are drawn from the pool of elected Supreme Court Justices. For these courts, the need for merit-based selection is viewed as outweighing the interest in direct voter choice.

At the other end of the spectrum, trial judges in New York's local courts are elected directly by the voters, both at primary and general elections. These courts are of limited subject matter and geographic jurisdiction. Voters are more likely to have direct knowledge of the candidates for their local courts without the need for expensive campaigns. The balance thus shifts in favor of direct voter involvement at all stages of the judicial selection process.

For its Supreme Court, New York has struck a different balance. Given the Supreme Court's wide-ranging subject matter and geographic jurisdiction, the candidates' legal qualifications take on even greater importance than for the local courts. At the same time, because of the size of New York's judicial districts, voters have less ability to assess those qualifications on their own, at least without costly campaigning by the candidates. And because voters often must fill multiple vacancies within a judicial district at once, the State has chosen a nominating method that permits parties to create balanced tickets. New York has selected the delegate-based convention system because it allows voters who may not be fully informed about candidates' qualifications to rely on a small set of delegates who can educate themselves and coordinate their efforts at a convention to nominate the best slate of candidates.

Those considerations certainly are debatable, and there may be other reasonable ways to balance the competing interests. But it does not follow, as respondents seem to assume (Resp. Br. at 27), that conventions survive only because they are burdensome and thus serve the purposes of those who would like to abuse them. Conventions serve legitimate interests, and the Legislature's decision to use them for only one category of judicial nominations is entirely reasonable. To be sure, conventions have gone out of fashion in recent decades, and there is a trend toward direct primaries for elective offices. But that does not make New York's choice to use conventions unconstitutional.

4. Contrary to Respondents' accusation, Resp. Br. at 39, New York did not adopt the convention-based model to eliminate voter education or to prevent candidates from communicating with voters. Candidates are free to communicate as they like, either with the voters who elect delegates or with the delegates themselves. The delegate-based nominating convention model merely recognizes that the electorate often has little basis to make an informed judgment when choosing candidates for judicial office, a problem that is exacerbated in large geographic jurisdictions. *See Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991) ("Most voters never observe state judges in action, nor read judicial opinions"). In New York's judgment, conventions have an advantage over direct primaries in this respect while still giving the voters a chance both to influence — indirectly — the selection of the nominee and to choose the candidate of their choice in the general election.

II. Private Conduct, Not New York's Election Law, Is the Cause of the Abuses About Which Respondents Complain.

1. Respondents recognize that they cannot prevail if the problems they perceive with judicial nominations are due to choices made by political parties and their members rather than the operation of state election law. *See* Resp. Br. at 32-33. The First Amendment, they apparently concede, does not regulate private conduct. For example, they admit that single-party dominance in a judicial district — even if it renders the general election a "*pro forma*" exercise — is not itself unconstitutional, because it likely reflects nothing more than the "free electoral choice" of individual voters. Resp. Br. at 11. Similarly, strict party discipline that causes party activists to support decisions made by their leadership does not raise constitutional questions, because it reflects private choices made by the members.

Thus, even if they were correct that the First Amendment guarantees rank-and-file members a direct say in the nomination process, respondents still must show that New York's elections laws *require* — not merely permit — party leaders to dominate the process and exclude the rank-and-file members. *See, e.g.*, Resp. Br. at 36-39. Respondents accept this burden, contending that under New York's election laws "*every* party is *required* to function as a Rubber Stamp Party" dominated by unchecked and abusive party leaders. Resp. Br. at 34-35 (emphasis in original). They also argue that New York's election laws "prevent[] parties from taking internal steps affecting their own process for the selection of candidates by effectively *requiring* political parties to fence out their rank and file members, leaving them with no voice in the parties' nomination process." Resp. Br. at 22 (emphasis added) (quotation marks and citation omitted).

New York's election laws, however, do no such thing. Nothing on the face of the challenged statutes requires that the nomination process be controlled by party leaders or that rank-and-file members be excluded from the nominating process. Rather, New York largely leaves it to the parties themselves to define their pre-convention deliberative processes and the amount of debate that should occur at the convention itself. If respondents think that the process is insufficiently deliberative and open, it is the parties — not the statutes — that they should be blaming.

New York's statutes set forth a basic and neutral framework for the convention system. Rank-and-file party members directly elect delegates from their assembly districts. *See* N.Y. Election Law § 6-124. Within broad parameters, the parties themselves determine the number of delegates to be elected from each assembly district. *Id.* And New York law makes it easy for interested voters to run or help others to run for delegate slots in their assembly district. *See id.* § 6-136(2)(i), (3) (requiring at most five hundred signatures on a designating petition). The statutes neither require delegates to support any particular judicial candidate nor prevent them from doing so. And parties are free to define their own pre-convention processes that might foster open debate and deliberation, such as setting up committees to screen the qualifications of prospective candidates, disseminating written or electronic information to delegates before the convention, or providing opportunities for face-to-face meetings between delegates and potential candidates before the convention.

The convention itself also provides an opportunity for the delegates, again under their party's own internal rules, to convene and deliberate with their party leaders to choose among qualified individuals for the office. New York's laws governing the convention are minimal. They regulate the

timing of the convention, and they require a majority of delegates or alternates to be in attendance before the convention can go forward. N.Y. Election Law §§ 6-126(1), 6-158(5). While parties convene the convention in accordance with their own rules, once convened the delegates are required to elect a chairperson to run the convention. N.Y. Election Law § 6-126. A roll-call vote of all delegates is required any time more than one candidate is placed in nomination for the office. N.Y. Election Law § 6-126(2). But aside from these bare-bones structural provisions, New York's election laws do not tell the parties whom they must consider at the convention, nor do they categorically exclude any qualified person from consideration. In particular, nothing prevents any delegate from submitting the name of any qualified candidate for a nomination.

Indeed, amici Law Professors, who support respondents, recognize that New York's statute "does not facially command that the leadership of the political parties run a coordinated slate of convention delegates; it does not compel convention delegates to 'rubber stamp' the candidates the party leadership supplies; and it does not expressly foreclose individual party members from securing a place on the primary ballot to become a convention delegate from their assembly districts." Amici Law Professors' Br. at 15. At most, amici argue that the State's nominating method "facilitates" domination by party leaders. *Id.* at 16. But that amounts to an argument that the First Amendment regulates the private conduct of political parties, and it certainly offers no basis for invalidating the statutes on their face.

The laws challenged here are thus quite unlike the filing-fee provisions invalidated in *Lubin v. Panish*, 415 U.S. 709 (1974), and *Bullock v. Carter*, 405 U.S. 134 (1972), upon which respondents rely. Resp. Br. at 24-27. In *Lubin* and *Bullock*, this Court struck down state laws that *required*

candidates to pay what was — at least for some — a prohibitive filing fee as an absolute prerequisite to the candidate's participation in primary elections. New York's election laws on their face erect no such absolute barriers. They do not "lock[]" the "gate," "block access," or "fence[] out" any qualified candidate. Resp. Br. 25, 37-38. While not every aspiring candidate may receive serious consideration at the nominating convention, that is neither surprising nor problematic. The whole point of conventions is to allow delegates to screen candidates as they see fit. And if — as respondents and some of their amici believe — the party's elected representatives unduly limit the number of candidates actively considered at the convention, that is a result of the internal decisions of the party, not the mandate of state law.

Respondents also argue that "New York's statutes are unconstitutional for reasons akin to those invoked by this Court in *[California Democratic Party v.] Jones*, [530 U.S. 567 (2000)], where the state mandated a nomination process that created a risk that rank-and-file members would be forced 'to give their official designation to a candidate who is not preferred by a majority or even plurality of its members.'" Resp. Br. at 22 (quoting *Jones*, 530 U.S. at 579). As in *Jones*, they maintain, the true purpose of New York's laws is to force political parties to accept candidates they may not want. Resp. Br. at 22. But the critical difference between the California blanket-primary law at issue in *Jones* and the New York laws challenged here is that California forced parties to cede some of their nominating prerogative to *outsiders* whose interests might be antithetical to those of enrolled party members. New York, by contrast, does not force rank-and-file members or the parties themselves to permit their nominating decisions to be influenced by non-party members. And because party nominations are determined using the party's own internal deliberative processes, by representatives

elected by rank-and-file party members themselves, there is no reason to think that the nominations for the office of Supreme Court Justice are antithetical to the interests of the party's rank-and-file.

2. Respondents complain about the brevity of the two-to-three week period between the date when the judicial delegates are elected (on the first Tuesday after the second Monday in September) and the date when the convention is held (after the first Tuesday following the third Monday in September and before the fourth Monday in September). Resp. Br. at 3. They nowhere explain, however, why two or three weeks are inherently insufficient for interested delegates to obtain information about potential candidates for judicial office. There is nothing to prevent aspiring candidates and party leaders from providing written information to the delegates during that period. Some districts already provide for screening panels to assess the qualifications of a number of candidates, and the results of the screening process or other background information on potential candidates can be provided to the delegates before the convention.

Indeed, aspiring candidates can provide information to prospective delegates well before the September primary because all potential delegates, many of whom are unopposed, are known by early July. All petitions for judicial delegates must be filed at least nine weeks before by the primary elections. *See* N.Y. Election Law § 6-158(1) (providing that petitions "shall be filed not earlier than the tenth Monday before, and not later than the ninth Thursday preceding the primary election"). Nothing prevents aspiring candidates from forwarding information about themselves to potential delegates who have filed petitions, opposed or unopposed. And nothing prevents potential delegates, whether they are opposed or not, from seeking out or reviewing information about potential nominees. The board

of elections of each county is required by statute to keep a list of the names and residences of all candidates who have filed petitions for judicial delegate, and that list is open to public inspection. *See* N.Y. Election Law § 6-144 (requiring that each county board of elections "shall keep a book, which shall be open to public inspection[,] in which shall be entered," among other things, "the names and residences of all candidates named" in petitions).

Thus, if in practice — as respondents believe — candidates find it hard to communicate with delegates, it is not because of the length of the pre-convention period or anything else in the statute. It is because of the private choices of the parties and their members.

3. Respondents ignore another element of private choice: the choice of party leadership. Contrary to respondents' contention, Resp. Br. at 23 n.5, rank-and-file members have a significant role in selecting their party leaders. Rank-and-file members directly elect their party's county committee members at primary elections. N.Y. Election Law § 2-106. These elected committee members in turn elect the party's county chairperson. N.Y. Election Law § 2-112. Rank-and-file members also elect their assembly district leaders at primary elections. N.Y. Election Law § 2-110. Thus, rank-and-file members have a direct or indirect say in the choice of their party's leadership. If the leadership consistently thwarts the rank-and-file members' preferences, the members can select new committee persons and district leaders, or the committee persons themselves can select new county chairpersons. Of course, when party leaders abuse their power to commit illegal acts, the State can and does step in to enforce its criminal and ethics laws.[1] Short of

1. *See* Brief of Amicus Curiae Charles J. Hynes, District Attorney for Kings County, at 16-23 (describing criminal prosecutions of political party leaders in Brooklyn), 24-25 (describing enforcement of ethics laws elsewhere in the State).

illegality, however, it is up to the party members themselves to make course corrections in their leadership. If they fail to act either because they are generally happy with the leadership's actions or because they do not care enough about judicial nominations to demand change, those are private choices that do not implicate the First Amendment.

Respondents also gloss over the private choices made in the general election. *See* Resp. Br. at 29 n.12. Those who are dissatisfied with a party's nominations have the option of running as candidates, or voting for non-party candidates, in the general election. *See* Attorney General's Pet. Br. at 8, 32-33. This Court has routinely considered alternative access to the ballot in cases challenging state laws as unduly burdensome on the associational rights of candidates and voters. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 439 (1992); *Storer v. Brown*, 415 U.S. 724, 737 n.7 (1974); *Jenness v. Fortson*, 403 U.S. 431, 440 (1971). If challenger candidates are unlikely to win the general election, it is not because the State has rigged the process against them. It is because voters value party loyalty and choose to support the decisions of their leaders above all else. But as respondents recognize, Resp. Br. at 11, party loyalty reflects free electoral choice and thus does not raise constitutional questions.

III. The Lower Courts Erred in Ordering Direct Primary Elections.

Should the Court find a constitutional flaw in the State's delegate-based convention system, it should let New York's Legislature decide how to fix the problem rather than imposing the direct primary elections that the Legislature has expressly rejected for Supreme Court nominations. The courts below ordered primaries on the theory that they are the State's default nominating method. But as respondents acknowledge, Resp. Br. at 47, when it restored conventions

in 1921, the Legislature made a deliberate decision not to provide for primaries. And respondents do not dispute that primaries have been debated and rejected in the years since then as well. *See* Attorney General's Opening Br. at 11-12.

New York's election laws provide no answer to how the Legislature would act if its current convention-based system for the office of Supreme Court Justice office were invalidated. Election Law § 6-110 mandates direct primaries only "except as provided for herein." And it is clear that the State has made the choice to use other methods to select candidates for particular offices. For example, appellate judges and judges on many specialized trial courts are appointed. *See generally* N.Y. Const. art. VI. Parties may use caucuses to nominate candidates for certain local offices. *See* N.Y. Election Law §§ 6-108, 6-202. For statewide offices, New York allows each party's state committee to designate the party's candidate for office, and if no other candidate gets more than twenty-five percent of the committee votes cast, the candidate getting the majority vote becomes the party's nominee on the general election ballot. *Id.* § 6-104.

Were New York's current convention-based system for Supreme Court Justices to be invalidated, the Legislature might wish to turn to any of these alternatives. Or it could modify the current system to provide more opportunity for rank-and-file voters to influence their party's nominations, perhaps by providing for pre-convention primaries that would bind delegates, or post-convention primaries that pitted the candidates selected at the convention against others who petitioned their way onto the primary ballot.

The briefs of respondents and their amici make it evident that there is a robust debate about how the New York should choose its Supreme Court Justices. While many decry shortcomings of the current system, not all agree that direct

primary elections are the solution to the problem. For example, amici such as the New York State Bar Association support appointment rather than election of Supreme Court Justices. Br. for amici the City of New York et al., at 2-8. And while they accept the injunction imposed below as an interim measure, they warn that substituting a system of direct primaries in place of party conventions would be a cure "worse than the disease" itself. *Id.* at 4.

In view of the ongoing policy debate about the optimal selection system for Supreme Court Justices, if the Court find the statutes unconstitutional, it should respect the State's choice to rely on delegate-based nominating conventions and tailor its remedy to the specific flaws that make that system unconstitutional. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006) ("[W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem. . . . [W]e try not to nullify more of a legislature's work than is necessary, for we know that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.") (quotation marks and brackets omitted). When a statute is constitutionally flawed in some respect, the court must decide what the Legislature would have done had it known about those constitutional flaws. *See United States v. Booker*, 543 U.S. 220, 246 (2005) ("We answer the remedial question by looking to legislative intent. We seek to determine what Congress would have intended in light of the Court's constitutional holding.") (citations and quotation marks omitted). Here, there is no reason to think that the New York State Legislature would have wanted primaries if there were flaws in the convention system. A narrowly tailored remedy, coupled with an opportunity for the Legislature to substitute a different solution if it so chooses, would ensure that the federal courts do not make basic policy choices that properly belong to the State acting through its Legislature.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York
120 Broadway
New York, NY 10271
(212) 416-8016

BARBARA D. UNDERWOOD*
Solicitor General

BENJAMIN N. GUTMAN
Deputy Solicitor General

DENISE A. HARTMAN
Assistant Solicitor General

Attorneys for Petitioner
Attorney General of the State of New York
as Statutory Intervenor